No. 97-428

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AIR LINE PILOTS ASSOCIATION,
Petitioner,

v.

ROBERT A. MILLER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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Respondents' brief in opposition is devoted primarily to arguing the merits of the issues presented, and largely repeats arguments made in the opinion of the court of appeals below. We believe we have adequately addressed most of these matters in the petition. We do wish, however, to comment briefly on respondents' arguments with respect to the first two issues raised by the petition.

I. THE EXHAUSTION ISSUE

Respondents, like the court below, invoke the principle that a party who has not agreed to arbitration cannot be forced to submit to it. The "impartial decisionmaker" procedure at issue in this case, however, although often called "arbitration," is not arbitration in the conventional

sense. Ordinary arbitration is a voluntary procedure that both sides are free to accept or reject. The "impartial decisionmaker" procedure required by *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), on the other hand, is mandatory, at least on the union. The question of whether agency-fee challengers must exhaust this procedure before bringing a lawsuit against the union therefore arises in a unique context, completely different from ordinary, voluntary arbitration.

Thus, the concurring justices in *Hudson*, who were certainly familiar with the law of arbitration, nevertheless expressed the view that an exhaustion requirement should apply to the "impartial decisionmaker" procedure mandated by that case. 475 U.S. at 311. Respondents' suggestion that the *Hudson* majority implicitly rejected this view is completely unfounded. Respondents attempt to draw that inference from the majority's footnote observation that any decision of the impartial decisionmaker "would not receive preclusive effect in any subsequent § 1983 action," 475 U.S. at 308 n. 21, but that statement was plainly concerned solely with safeguarding the challenger's right to go to court *after* the "impartial decisionmaker" procedure has been exhausted, not before. It is apparent that the *Hudson* majority simply chose not to address the exhaustion issue, since it was not presented on the facts before it.

Respondents also argue that any exhaustion requirement would violate Article III of the Constitution. If this argument had validity, then the *Hudson* decision itself would be inconsistent with the Constitution, for it plainly forces unions to submit agency-fee disputes to nonjudicial decisionmakers. If such an obligation can be forced on unions, surely it can also be forced on challengers. An exhaustion requirement would not in any way deprive such challengers of their ultimate right to bring an action in federal court; it would simply impose a procedural pre-

requisite to such a suit, no different from the exhaustion requirements that are imposed in many other contexts.

Nor are the cases dealing with the duty of fair representation (DFR) under the National Labor Relations Act, cited at page 5 of respondents' brief, relevant. The issue involved in those cases—whether the National Labor Relations Board has exclusive jurisdiction over DFR complaints under that statute—has absolutely nothing in common with the exhaustion issue in the present case.

Finally, respondents argue for the first time that the American Arbitration Association (AAA) procedure for selecting arbitrators in agency-fee cases, utilized by ALPA in this case, does not comport with the requirements of *Hudson*. This issue was not raised below and has no place before this Court. The AAA procedure utilized by ALPA is the same one that virtually every other union uses, and has been upheld by every court before which it has been challenged. *See Grunwald v. San Bernardino City Unified School Dist.*, 994 F.2d 1370, 1376-77 (9th Cir.), *cert. denied*, 510 U.S. 964 (1993); *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1534-35 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993); *Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1373 (7th Cir. 1989); *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987); *Damiano v. Matish*, 830 F.2d 1363, 1371 (6th Cir. 1987); *Kidwell v. Transportation Communications Int'l Union*, 731 F. Supp. 192, 204 (D. Md. 1990), *aff'd on other grounds*, 946 F.2d 293 (4th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992).

II. THE DEFERENCE ISSUE

With respect to the issue of whether the decision of a *Hudson* impartial decisionmaker is entitled to any weight or deference in a subsequent court proceeding, respondents once again rely on arbitration law, arguing that because they did not agree to submit their complaints to the im-

partial decisionmaker, they cannot be bound by his decision. We have never contended, however, that the impartial decisionmaker's decision should be as binding and unreviewable as those of an arbitrator. The question, rather, is whether such a decision is entitled to any deference at all, at least with respect to questions of fact. Contrary to respondents' argument, this Court's statement in *Hudson* that the decisionmaker's decision "would not receive preclusive effect" does not settle the issue of whether it is entitled to any deference whatever.

If respondents are correct in their contentions concerning the exhaustion and deference issues, the result would be the following:

—Unions would be required to provide an impartial decisionmaker procedure, but agency-fee challengers would be free to invoke or ignore it as they pleased.

—If some challengers invoked the procedure while others proceeded directly to court, as occurred in this case, the union would be compelled to defend its agency-fee calculation in both forums simultaneously.

—If the impartial decisionmaker decided any issues in favor of the union, the challengers would be free to relitigate those issues *de novo* in a federal court.

—If the impartial decisionmaker decided any issues in favor of the challengers, there are two possible outcomes, neither of which makes much sense. Either the union would have the same right as the challengers to relitigate those issues *de novo*, which would make the entire procedure an absurdity because it is binding on no one, or the union would be bound even though the challengers are not, which would obviously be unfair.

We cannot believe the Court intended its decision in *Hudson* to lead to any of these results. Certainly a much more sensible and fair approach is the one adopted by the district court in this case, which provided limited review

of the fact-findings of the impartial decisionmaker (subject to a "clearly erroneous" standard) but *de novo* review of all issues of law.

In any event, only this Court can resolve these issues. The impartial decisionmaker procedure mandated by *Hudson* is unique in the law, and no real guidance can be found in cases arising in other contexts. This Court, having mandated this procedure, should use this case to resolve both the exhaustion question and the question of what deference, if any, an impartial decisionmaker's findings should be given by the courts.

CONCLUSION

For the reasons stated above and in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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